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## FISCAL IMPACT REPORT

SPONSOR Sanchez, M DATE TYPED 3/8/2005 HB 233/aSPAC/aSJC/aSFL #1  
 SHORT TITLE Children's Code Revisions SB /aHCPAC  
 ANALYST Dunbar

### APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY05	FY06	FY05	FY06		
	NFI				

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Children Youth and Families Department (CYFD)  
 Health Policy Commission (HPC)  
 Administrative Office of the DA (AODA)  
 Department of Public Safety (DPS)  
 Attorney General (AG)  
 Administrative Office of the Courts (AOC)

### SUMMARY

#### Synopsis of HCPAC Amendment

The House Consumer and Public Affairs Committee amendment Senate Bill 233 strikes SJC amendment # 2 pertaining to children not in custody or detention and ruling out dismissal of a petition for failure to comply with the time limit unless there is showing of "prejudice" to the child. Previous language contained the words "actual and substantial prejudice" to the child. The change in language is a compromise reached between the DA's and the Public Defender. The Public Defender noted that the burden of proof was unreasonably high for the child to show "actual and substantial prejudice" in dismissing the petition.

Synopsis of SFL Amendment # 1

The Senate Floor Amendment # 1 amends Section 9-2A-8 NMSA 1978 (Department Additional Duties) with new language requiring the inclusion of “training for protective services division employees involved in a preliminary investigation pursuant to Section 32A-4-4 NMSA 1978” (Complaints; Referral: Preliminary inquiry Section of the Child Abuse and Neglect Act).

CYFD notes that the training requirement described in this bill is already being provided. CYFD provides protective services employees involved in preliminary investigations with extensive training regarding disposition, placement under the Children’s Code and parents’ rights.

Synopsis of SJC Amendment

The Senate Judiciary Committee amendment to Senate Bill 233 eliminates SPAC amendment # 4 and inserts language that clarifies the original amendment by limiting the provision to a child that is not in custody or detention. The amendment also clarifies language on page 40 pertaining to short term commitments. Finally, SJC amendment eliminates language on page 153 referencing adoptions and background checks. The original language provided for background checks of federal, state and local criminal records searches and statewide abuse and neglect searches of the person being checked. Language remains in the bill that provides for fingerprinting of a person who files a petition to adopt a child and to use the set of fingerprints to conduct a background check with the Department of Public Safety and the FBI.

Synopsis of SPAC Amendment

The Senate Public Affairs Committee amendment to Senate Bill 233 corrects an unclear provision in the original bill regarding preliminary inquiries (PIs) under the Delinquency Act and provides more realistic time frames for PIs and for the filing of delinquency petitions following PIs. In addition, the amendment clarifies the handling of youthful offender sentencing on juveniles’ charges with first degree murder, not convicted of first degree murder but convicted of another youthful offender offense.

This amendment (pages 28 –29 of the bill) clarifies and makes more practical the timeframes for conduct of PIs on juveniles not in detention, and the timeframes for the filing of delinquency petitions by a District Court following receipt of the PI. Without this amendment, the bill required PIs to be completed within 14 days, and did not specify what happened if the PI was not completed within the timeframe, particularly whether the failure to complete a PI meant the juvenile petition could never be filed at all, which was never the intent of the bill. The amendment provides more realistic timeframes for PIs and charging decisions, and makes provision for extensions of time to do PIs and to file delinquency petitions under appropriate circumstances.

This amendment also clarifies an unclear provision in the original bill (page 47 of the bill), which implies, as originally written, that only youthful offender dispositions could be imposed even if the child were convicted of first degree murder. The amendment makes clear that only a child charged with but not convicted of first degree murder is subject to youthful offender dispositions if found to have committed a youthful offense.

According to AODA the amendments will- allow juvenile probation officers and prosecutors doing children's court cases to conduct a more thorough investigation and follow-through on cases

than the time limits and language originally proposed. Not allowing dismissal for failure to comply with the time limits unless there is actual and substantial prejudice will keep cases from being needlessly dismissed. The changes will allow more adequate time for investigation, screening and filing of charges in serious cases that take longer to get an investigation completed.

### Synopsis of Original Bill

Senate Bill 233 enacts many procedural and substantive amendments to the New Mexico Children's Code.

### Significant Issues

#### ARTICLE ONE: GENERAL PROVISIONS

The proposed revisions establish client-directed representation for children aged fourteen or older in proceedings under the Children's Code. This change empowers older children by giving them a stronger voice in decisions being made about their lives. Children under the age of 14 continue to have attorney guardians *ad litem* who represent the child's best interest. The best interests of older children will continue to be the responsibility of CYFD, the court appointed special advocate (CASA), and the children's court. This change was a result of a multi-year study by the New Mexico Supreme Court's Court Improvement Project on improving representation for children.

The bill also enacts a new section governing the representation of attorneys in proceedings in Children's Court. This new section would prohibit an attorney representing a child in a Children's Court proceeding from also representing that child in any action filed on behalf of the child outside of the Children's Court or obtaining any pecuniary interest in such actions. However, the new section would authorize the child's attorney to retain other counsel to represent the child in other actions.

#### ARTICLE TWO: DELINQUENCY

- **Adds "aggravated battery on a household member" to the enumerated youthful offender provisions.** *This is necessary because the offense of aggravated battery, presently listed, is a less specific offense and some fact scenarios could require that aggravated battery on a household member be charged, rather than aggravated battery.*
- **Establishes timeframes to ensure timely preliminary inquiries.** *Preliminary inquiries support the detention reform concept by creating an opportunity for the juvenile probation officer, client and Family to consider alternatives to criminal charges.*

*AODA expresses concerns that changes proposed in these sections would significantly alter the processing of delinquency referrals and how preliminary inquiries are handled for juveniles held in detention for a detention hearing. Notifying parents of the time and place of a preliminary inquiry will add to the responsibilities of the juvenile probation officer. Allowing parents to be present for a preliminary inquiry will add to the responsibilities of juvenile detention centers. More manpower will have to be expended for security concerns regarding parents coming into the detention center on short notice. This will have a financial impact on juvenile detention centers. There is no remedy spelled out for failure to notify the parents of a preliminary inquiry for a juvenile held in detention,*

*nor for failure to allow the parent to be present during a preliminary inquiry held while the juvenile is in the detention center.*

*Additionally, the AODA states that the changes in deadlines with regard to preliminary inquiries and filing of charges will help process cases through the system more quickly. On the other hand, the question arises: would the proposed deadlines result in more cases being filed because prosecutors may file a petition even when complete investigations and reports are not available before the expiration of the 30 days? Erring on the side of caution ( child shall be released), prosecutors may file charges based on initial reports or probable cause statements, when waiting for completed cases might reveal that a case is not worth pursuing. The struggle to get completed investigations and reports may move into the court arena if charges have to be filed within 30 days of the preliminary inquiry, which would then involve the resources of the court and the public defender, as opposed to only the resources of the DA's office and the police agency.*

- **Adds new language to provide that no child under the age of eleven may be held in detention.** *If the child poses a threat to himself or others an emergency evaluation may be conducted under the Children's Mental Health Act.*

*The AODA comments that children under 10 years old who are charged with a delinquent act and who have no family willing or able to take custody, or who are unsafe if returned to the home, will have to have other arrangements made by police officers, and possibly probation officers and detention center employees. This would add to their responsibilities, and given the lack of resources to place children, could lead to a great deal of frustration. On the other hand, 10 years old and younger is a very young and tender age to be placed in detention with much older, and often hardened, juveniles. The possibilities for victimization are many. Competency will almost surely be an issue for any child under age 11 charged with a delinquent act, and ultimately most will probably not be charged.*

- **Provides that the mandatory 90-day parole period will be served as part of the commitment period, revocable if the conditions of parole are violated.** *This will ensure that facility clients receive supervision upon returning to the local community, and will provide clients with an incentive to abide by parole conditions and receive community-based services. This section also provides CYFD with the option to request a commitment extension for clients who are not ready for parole and in need of further facility rehabilitation.*

*A possible downside of the proposal, according to the AODA is that for those few juveniles whose performance and prognosis is so poor that they will almost certainly not be successful on parole, an early release will put the community at risk. This group would have previously been held for the full length of their commitment, but will now be released three months earlier. This provision would probably save a small amount of money as it costs less to have someone on parole than to house them in a secure facility.*

*AODA states that-allowing extensions of short-term commitments will give juvenile corrections officials and, arguably, judges and prosecutors more latitude in dealing with problem juveniles who are committed, and with juveniles who do not have a stable home environment. Some juvenile committed for a short-term are not ready to return home or*

*to society within a year of commitment. Although it is anticipated that there would be relatively few extensions requested in short-term commitment cases, those that were held and granted would cost the State more money to house. Hearings on extension requests would also take more court time and resources, which would also be the case for prosecutors, defense attorney's, probation officers, etc.*

*AODA says that requiring the 90-day minimum period of parole to fall within the time of the commitment will give the parole period more significance. If a juvenile violates the terms and conditions of parole, they can be sent back to the institution for the remainder of the commitment. If parole is served after the period of commitment, there is little that can be done if parole is violated.*

*AODA also notes that, changing the standard for granting an extension from finding that the extension is "necessary to safeguard the welfare of the child or the public interest" to the public "safety", could change the showing required for extension, and make it more difficult to obtain extensions.*

- **Changes parole revocation procedures.** *A child on parole from a agency that has legal custody who violates the terms of parole may be proceeded against in a parole revocation proceedings conducted by the department or the supervising agency or by a hearing officer that is neutral to the child or family. This appears confusing and perhaps should be limited to the neutral third party.*
- **Reduces the penalty and disposition for a child aged 14 or older who has been charged with first degree murder but found guilty of a lesser offense.** *Current law allows imposition of an adult sentence for such children or commitment until age 21, as "youthful offenders". This bill would require such children to be sentenced as delinquent children, which involves less severe penalties.*

*AODA is concerned that it is not clear that if a serious youthful offender is convicted of a youthful offender offense, but not first degree murder, then they should be treated as a youthful offender for disposition purposes. The way it is worded makes it appear that if they are convicted of first degree murder and a youthful offender offense, then the disposition is as a youthful offender, as opposed to a serious youthful offender. Realistically there would be very few cases affected by this change, although it could have implications for plea negotiations. This change would in effect overrule the holding of State v. Muniz, which seemed to hold that a serious youthful offender convicted of what would only be a delinquent offense, could still be sentenced as an adult.*

- **The terms "developmentally disabled or mentally disordered" in the present statute are changed to the more accurate terms, "children with developmental disabilities or mental disorders."**
- **New language makes specific provisions for the handling of cases in which a child is found to be incompetent to stand trial.**

The AODA provides the following comments:

*What is required for a "finding" of incompetence in a misdemeanor case? At a mini-*

*mum, Is some sort of hearing required? What about a probation revocation case? Would that be considered a misdemeanor or felony? Does immediate dismissal of misdemeanor case on a finding of incompetence operate function to close the case too quickly? Some dangerous (and possibly incompetent) juveniles end up with various misdemeanors, and often are committed based on misdemeanor adjudications after they have built up a lengthy enough record. On the other hand, misdemeanor charges may not be worth the time and resources when a serious competency issue exists. Certain misdemeanors have victims, and some, such as domestic violence misdemeanors, are now covered by the Victims of Crime Act. Would a reasonable alternative be a dismissal without prejudice, allowing the prosecutor the option of refiling the petition if it was felt that the juvenile might now be competent and that the case is worth pursuing?*

*As to felonies: What triggers the stay? Is it when the issue is raised, as Children's Court Rule 10-226 seems to indicate? Is it a finding of incompetence? What is required to find that a child "cannot be treated to competency", thereby mandating dismissal of the petition? Is a hearing of some sort obligatory? Is there a standard of proof that would apply? How does this provision interact with the provision that requires review of competency every 90 days up to a year, and then, if the child is not competent, the petition must be dismissed (without prejudice)? What is the difference between a finding that the child "cannot be treated to competency" (thereby mandating dismissal), and the review of a case every 90 days to address competency? How does a judge make the determination that one person will not attain competency thereby dismissing the petition, and the petition will be dismissed, but another will continue on to the next 90-day review?*

- **Amends confidentiality language to clarify that all social records pertaining to a child including detention facility records and other client identifying information are confidential.**

*The primary question this proposed legislation raises is whether releasing the identity of arrested juveniles would be permissible. Also, would it prohibit the release of the identities of juveniles who escape from juvenile detention facilities or from CYFD facilities? If this is the effect of this legislation, there could be public safety issues at stake—particularly with regard to escapees.*

*The AODA says that the restrictions proposed on what information schools and parents may have access to, seems to relate to a desire to make sure that information in records that may be used against the child is not disclosed. For instance, if the records contain allegations the child has made of abuse against the parent, it seems to be the intent of the legislation to prohibit the parent from having access to that information. Information that a school might use to label a juvenile as a troublemaker or someone with certain propensities based on past record may also be the type of thing that cannot be disclosed under the proposed legislation. CYFD will have to be careful in crafting regulations and policies to implement the provisions of this confidentiality section.*

#### ARTICLE THREE: FAMILY SERVICES ACT

- **The revisions to this article provide for a simple referral process** whereby CYFD, to the extent possible, assists children and families in accessing appropriate community services. The process schools were asked to follow before requesting services has been eliminated. Also, the responsibilities of the department of public education and the de-

*partment of health, with regard to the referral process, have been eliminated, with the process now falling squarely on CYFD, subject to the availability of resources.*

- **The revisions provide for increased time limits on voluntary placements,** *to give CYFD programs adequate time to succeed in assisting families in need of services. (The maximum time frame for voluntary placements is extended from 180 days to 360 days).*
- **The revisions broaden the definition of a family in need of services to a child or family wherein the child's behavior endangers the child, thereby allowing that family to request services from CYFD for the child or the family.** *Should the language specify the program within the department where the family in need of services makes the request?*
- **The revisions remove the criteria relating to a child's absence from school for ten days without excuse as one of the factors to be designated a "family in need of services";**
- **The revisions increases notification requirements to Tribes with regard to proceedings against, placement, and disposition of Indian children;**
- **The AG notes that the bill also repeals NMSA Section 32A-3A-5 which contained requirements for a "plan for family services" under the Family in Need of Services Act.** *Presumably the elimination of this section will give the CYFD more discretion and latitude to provide services without being restricted by the time limits and plan requirements contained in this section.*
- **This bill changes various provisions in the Family in Need of Court Ordered Services Act, 32A-3B-1 et seq.** *This act is invoked when a family has refused services from CYFD or that department has exhausted available services and court intervention is necessary. The amendments relate to appointment of attorneys for children, attendance at hearings by children, confidentiality provisions, and placement of Indian children.*

#### ARTICLE FOUR: ABUSE AND NEGLECT

- **A provision is added giving the investigating entity the authority to conduct the investigation in a manner it determines will protect the privacy of the child and family, with paramount consideration for the child's safety.**
- **A provision is added requiring the Department to notify the parents or guardians of a child to be interviewed unless that notification would adversely affect the safety of the child or compromise the investigation.**
- **To comply with the federal Adoption and Safe Families Act,** *provisions are added which require the children's court to conduct a permanency hearing no later than twelve months after a child has entered foster care, and provide additional flexibility in arriving at permanency goals for families and children.*
- **As noted above, provision is made for children fourteen years of age or older to be represented by a client-directed attorney in all abuse/neglect proceedings.** *A provision is also added requiring that children fourteen and over be allowed to attend court hearings unless the court documents a compelling reason to exclude the child.*
- **Strengthens the language on confidentiality of records, and authorizes CYFD to establish regulations for implementing the disclosure of records.**
- **Requires that law enforcement officers investigating alleged abuse or neglect be so trained.**
- **Provides for "protective supervision" of the child by CYFD.** *This is newly defined as the right to visit the child at home, inspect the home, and transport the child to court-ordered examinations and to obtain information and records concerning the child.*

- **Eliminates the factor of termination of parental rights to a sibling of the child as a factor which would *not* require a court to make reasonable efforts to preserve and reunify the family, and as requiring an automatic termination of parental rights of another abused or neglected sibling.** *In other words, under the bill, even if parental rights to a sibling have been terminated, the court must still make those efforts and may not automatically terminate parental rights to another sibling.*
- **Requires that a person be a party to the abuse and neglect proceeding in order to move to terminate parental rights.** *Current law allows foster parents and relatives to move for termination even if they have not intervened and been made parties.*
- **Eliminates service by publication for parents whose location is unknown.**
- **Eliminates court appointed attorneys for parents.**

#### ARTICLE FIVE: ADOPTIONS

- **The age at which a child must consent to being adopted is raised from age ten to age fourteen.** *This change is consistent with the overall scheme of making age fourteen the threshold for acquiring additional rights and responsibilities. The change also addresses a clinical concern of many social workers that at age ten children in the foster care system do not have the emotional maturity and clarity to hold a veto power over their adoption.*
- **In order to achieve required consistency with recent amendments to the federal Child Abuse Prevention and Treatment Act, a provision is added requiring fingerprinting and national criminal history record checks, as well as department background checks on prospective foster and adoptive parents *and all adults living in the household.*** *(The provisions requiring criminal history and records checks on foster parents are in the current law. The new language now includes other adults, including relatives, living in the household.)*
- **A requirement is added that all relinquishments of parental rights in adoptions cases must be taken on the record in the children's court.** *In addition, a requirement is added that the children's court must state that unless the adoption is specified as an "open adoption" under section 32A-5-35, the parties understand that the court will not enforce any agreements regarding contact between the birth parents and the child. These provisions are added to ensure that birth parents fully understand their rights and the full consequences of their relinquishments or consents to adoption.*
- **Administration of subsidized adoptions:** *The change to this section allows the department to continue adoption subsidy payments until the age of 21 for children on the "medically fragile waiver program." These children are among the state's highest need children, and their adoption subsidies are permitted under Medicaid to past the age of 18. This provision impacts on a very small number of children. It would have, therefore, minimal fiscal impact and could be absorbed by the base budget.*
- **A provision is added for penalties for violation of the confidentiality provisions of the Adoption Act.** *This is consistent with the penalty provisions already found in the Delinquency and Abuse/Neglect Articles.*
- **Provides criminal misdemeanor penalties for release of records which are confidential under the Adoption Act**
- **Requires that pre-placement studies of prospective adoptive parents be completed or updated within one year immediately prior to the date of placement;**



## **PERFORMANCE IMPLICATIONS**

The proposed revisions are aligned with several family services, juvenile justice and protective services performance measures. Several revisions allow CYFD to achieve conformity with the federal Adoptions and Safe Families Act and Indian Child Welfare Act to ensure that children achieve permanency as quickly as possible and to improve the quality timeliness and appropriateness of services provided to children and families.

## **FISCAL IMPLICATIONS**

The proposed revisions will result in minimal fiscal impact absorbed in the CYFD base budget

## **ADMINISTRATIVE IMPLICATIONS**

CYFD is prepared to develop policies and procedures consistent with the proposed revisions.

DPS notes that changes affecting law enforcement will require training specifically in the area of child abuse/neglect; the increased workload generated regarding fingerprinting and background checks may require additional staff.

AOC says the courts may need additional judicial and administrative resources to carry out the changes described above.

## **TECHNICAL ISSUES**

DPS states that legislation involving background checks and fingerprinting must include specific broiler plate language to ensure compliance with public law 92-544.

## **OTHER SUBSTANTIVE ISSUES**

The AG notes that the bill also repeals a 2003 law which was never codified because it conflicted with another law passed in that session and signed last by the Governor. The law that was not codified amended Section 32A-2-19 to provide for a ninety-day parole period after short-term commitment of one year if a child was adjudicated delinquent, as one of the commitment options. This repeal is redundant since this bill also amends that section as described above.

The bill also repeals NMSA Section 32A-3-1, the title section to the Family in Need of Services Act. That section apparently was already occupied by another law. This repeal corrects a compilation inconsistency and is inconsequential since the Act refers to itself by its title in its provisions, and this bill would amend Section 32A-3A-1 to formally designate the title of that Act.

BD/lg:yr